Supreme Court, U.S.
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In The Supreme Court of the United States

RAUL GALINDO-PENA,

Petitioner,

v.

ALBERTO R. GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

and

ALFONSO ACOSTA-GRIMALDO,

Petitioner,

v.

ALBERTO R. GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fifth and Eighth Circuits[1] hold that state felony convictions for drug offenses containing no trafficking element are "aggravated felonies" for purposes of the immigration laws, notwithstanding that such offenses would be punishable as misdemeanors under the Controlled Substance Act, (21 U.S.C. §801 *et seq.*). This holding conflicts with decisions from the Second, Third, Sixth, Seventh, and Ninth Circuits, and with a line of decisions spanning ten years from the Board of Immigration Appeals ("BIA" or "Board"), which the BIA abandoned as a result of this circuit conflict.

The Fifth Circuit dismissed, for lack of jurisdiction, Mr. Galindo's petition for review of a BIA decision which found such an offense to be an aggravated felony. Mr. Acosta's petition for review of a similar ruling was in part dismissed for lack of jurisdiction, and in part, summarily affirmed.

The questions presented are thus as follows:

1) Under 8 U.S.C. §1252(a)(2)(D), added by the REAL ID Act of 2005, does the United States Court of Appeals have jurisdiction over a petition for review of an

[1] Petitions for writs of certiorari are pending in the Eighth Circuit case, *Lopez v. Gonzales,* No. 05-547, and in another Fifth Circuit case, *Salazar-Regino et al. v. Moore,* No. 05-830, both of which present the same issue as is involved herein. *See also,* pending petitions for certiorari to the Fifth Circuit in *Toledo-Flores v. United States*, 05-7664, and *Mendoza-Torres v. United States*, 05-7496, both of which involve the same issue, in the context of the United States Sentencing Guidelines, ("USSG").

QUESTIONS PRESENTED – Continued

order of removal issued by the Board of Immigration Appeals based on a finding that a state felony conviction for possession of a controlled substance is an aggravated felony under 8 U.S.C. §1101(a)(43)(B), where the offense contains no trafficking element and would be punishable only as a misdemeanor under the Controlled Substances Act, ("CSA"); and

2) Does the definition of "aggravated felony" found at 8 U.S.C. §1101(a)(43)(B) include a state conviction for possession of a controlled substance, where the offense contains no trafficking element and would be punishable only as a misdemeanor under the Controlled Substances Act, ("CSA"), but is classified as a felony under state law?

LIST OF PARTIES

Petitioners Raul Galindo-Pena and Alfonso Acosta-Grimaldo were the Respondents before the Executive Office for Immigration Review, and Petitioners in the Fifth Circuit Court of Appeals. In both cases, the United States Attorney General was the Respondent before the Fifth Circuit.

CORPORATE DISCLOSURE STATEMENT

REFUGIO DEL RIO GRANDE, Inc., which is filing the instant petition on behalf of Petitioners, is a not for profit, Section 501(c)(3) corporation. It has no stock, and no parent corporation.

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I. PETITION FOR WRIT OF CERTIORARI

Raul Galindo-Pena and Alfonso Acosta-Grimaldo respectfully petition this Honorable Court for a writ of certiorari to review the judgments issued in their case by the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit, joined by the Eighth, but in conflict with the Second, Third, Sixth, Seventh, and Ninth Circuits, holds that a state drug offense which contains no trafficking element and which is a felony under state law, but would be punishable as a misdemeanor under federal law, is an aggravated felony under the immigration laws.

Here, the Fifth Circuit dismissed Mr. Galindo's petition for review for lack of jurisdiction. In Mr. Acosta's case, the Court in part, dismissed the petition for review for lack of jurisdiction, and in part, summarily affirmed the BIA's decision.

II. OPINIONS BELOW

In neither case did the Court of Appeals issue an opinion. *See* Appendix ("App."), at pp. 1 and 17, and in neither case was the decision of the BIA published. App. at pp. 2 and 20.

III. JURISDICTION

The Fifth Circuit judgments were entered January 12, 2006, in Mr. Galindo's case, App. at p. 1, and March 16, 2006, in the case of Mr. Acosta. App. at p. 17. This Court has jurisdiction under 28 U.S.C. §1254(1).

IV. STATUTORY PROVISIONS INVOLVED

The following statutory provisions are involved: 8 U.S.C. §1101(a)(43)(B), App. at p. 33; 8 U.S.C. §1229b(a); 8 U.S.C. §1252(a)(2)(D); 18 U.S.C. §924(c), App. at p. 34; Texas Health and Safety Code §481.121(a); Texas Health and Safety Code §481.102(3)(D), and Texas Health and Safety Code §481.115.

8 U.S.C. §1101(a)(43)(B)

8 U.S.C. §1101(a)(43):

(43) The term "aggravated felony" means –

(B) illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act [21 U.S.C. §802]), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code);

. . .

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. . . .

8 U.S.C. §1229b(a)

1229b. Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents. The Attorney General may cancel removal in the case of an alien who is

inadmissible or deportable from the United States if the alien –

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

8 U.S.C. §1252(a)(2)(D)

(D) Judicial review of certain legal claims. Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

18 U.S.C. §924(c)(2)

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

Texas Health & Safety Code §481.121(a)

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly

or intentionally possesses a usable quantity of marihuana.

Texas Health & Safety Code §481.102(3)(D)

§481.102. Penalty Group 1

Penalty Group 1 consists of:

. . .

(3) the following substances, however produced, except those narcotic drugs listed in another group: . . .

(D) Cocaine . . .

Texas Health & Safety Code §481.115

§481.115. Offense: Possession of Substance in Penalty Group 1

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 1 . . .

V. STATEMENT OF THE CASE

Petitioners seek review of the Fifth Circuit's holding that a state felony drug conviction that has no trafficking element and would be punishable as a misdemeanor under the Controlled Substances Act is an "aggravated felony" under the immigration laws. They also urge that jurisdiction lay under 8 U.S.C. §1252(a)(2)(D) for the Fifth Circuit to review their claims that their offenses were not aggravated felonies under 8 U.S.C. §1101(a)(43)(B).

Any non-citizen convicted of an offense relating to a controlled substance, other than a single conviction for possession for personal use of thirty grams or less of marijuana, is deportable. 8 U.S.C. §1227(a)(2)(B)(I). A non-citizen convicted of an aggravated felony is also deportable, 8 U.S.C. §1227(a)(2)(A)(iii).

Lawful permanent residents ("LPRs"), who are deportable due to drug convictions may apply for cancellation of removal if they meet three conditions. They must: (1) have been a lawful permanent resident for not less than five years; (2) have resided continuously in the U.S. for not less than seven years following a lawful admission; and (3) not have been convicted of an aggravated felony. 8 U.S.C. §1229b(a). Except for those few who qualify for relief under (prior) Section 212(c) of the Immigration and Nationality Act ("INA"), as a result of *INS v. St. Cyr,* 533 U.S. 289, 323-24 (2001), any non-citizen who is deportable under *both* 8 U.S.C. §§1227(a)(2)(B)(I) and 1227(a)(2)(A)(iii) is subject to mandatory removal, is ineligible for any form of relief, and is permanently barred from returning. If Petitioners' convictions are held to be aggravated felonies, they will therefore face mandatory deportation, permanent exile, 8 U.S.C. §1182(a)(2)(A)(i)(II), and criminal sanctions of up to twenty years in prison for illegal reentry, 8 U.S.C. §1326(b)(2).

A. "AGGRAVATED FELONY" AND "DRUG TRAFFICKING CRIME"

Determining the meaning of "aggravated felony" as applied to drug offenses requires navigating what has been described as "a rather confusing maze of statutory cross-references." *United States v. Palacios-Suarez,* 418

F.3d 692, 694 (6th Cir. 2005). The INA defines "aggravated felony" as "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." 8 U.S.C. §1101(a)(43)(B). It further provides that the term applies to an offense "whether in violation of Federal or State law." *Id.* at §1101(a)(43).

This creates two categories of drug convictions that are aggravated felonies: State or federal offenses involving "illicit trafficking" in a controlled substance (which provision is not at issue herein), and any offense that it is a "drug trafficking crime" within the meaning of 18 U.S.C. §924(c). In turn, 18 U.S.C. §924(c)(2) defines "drug trafficking crime," as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*)" and two other federal statutes (which are also not involved herein).

B. THE COMPETING APPROACHES

The circuits are divided on the underlying issue of whether "any felony punishable under the Controlled Substances Act . . . " includes a state felony drug conviction that does not contain a trafficking element, and would be punishable only as a misdemeanor under federal law. There are two primary competing interpretations: the so-called "hypothetical federal felony" approach, initially adopted by the BIA in *Matter of Barrett,* 20 I&N Dec. 171 (BIA 1990), and the "Guidelines approach," which the

Fifth Circuit adopted in *United States v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997).[2]

As explained in *Liao v. Rabbett*, 398 F.3d 389, 391 (6th Cir. 2005), the "hypothetical federal felony" approach "reads the phrase 'any felony punishable under the CSA' to mean any conviction *punishable as a felony* under the CSA." Under the "Guidelines approach," as the Fifth Circuit concluded in *Hinojosa-Lopez,* 130 F.3d at 694, "the defendant's prior state conviction for simple possession of cocaine qualified as an aggravated felony," because it satisfied two elements: 1) it was punishable under the CSA, and 2) it was a felony under either state or federal law.

The Fifth and Eighth Circuits found that the "plain language" requires application of the Guidelines approach, and consequently neither applied the presumption of *Jerome v. U.S.*, 318 U.S. 101 (1943) (holding that the phrase "any felony" in a federal statute presumptively refers only to offenses which would be felonies under federal law), nor considered evidence of Congressional intent. The Third and Sixth Circuits found the statutory language to support both readings, and on examining the historical context, and applying the presumption in favor of uniformity, adopted the BIA's "hypothetical federal felony" approach, holding that such offenses are not

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[2] *Dicta* in *Gonzales-Gomez v. Achim*, 2006 U.S. App. LEXIS 7066 (7th Cir., March 22, 2006), suggested that the amount of drugs involved could determine whether a conviction was an aggravated felony. This would be inconsistent with the categorical approach. *See, e.g., Shepard v. United States*, 125 S.Ct. 1254, 1259 (2005) (the categorical approach analyzes offenses in terms not of conduct but in terms of the elements of the offenses).

aggravated felonies.[3] In *Gonzales-Gomez, supra*, the Seventh Circuit took a similar approach, noting, *id.*, at *7:

> Allowing cancellation of removal to depend on how severely a particular state punishes drug crimes would have the paradoxical result of allowing states, in effect, to impose banishment from the United States as a sanction for a violation of state law.

The Second and Ninth Circuits hold that such offenses are not aggravated felonies in the immigration context, but are aggravated felonies under the Sentencing Guidelines.[4] Four other Circuits have found such offenses to be aggravated felonies under the USSG, but have not addressed the issue in the immigration context.[5]

C. THE FACTUAL AND PROCEDURAL BACKGROUND

Petitioners are Mexican nationals and long-term permanent residents of the United States. App. at pp. 2-3 and 23. Mr. Acosta pled guilty to possession of marijuana, in violation of Texas Health & Safety Code ("THS") §481.121(a). App. at p. 23. Mr. Galindo pled guilty to

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[3] *See, Gerbier v. Holmes*, 280 F.3d 297 (3rd Cir. 2002); *U.S. v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005).

[4] *See, Aguirre v. INS*, 79 F.3d 315, 317 (2nd Cir. 1996); *U.S. v. Pornes-Garcia*, 171 F.3d 142 (2nd Cir. 1999); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004); *United States v. Ibarra-Galindo*, 206 F.3d 1337, 1339-40 (9th Cir. 2000).

[5] *United States v. Wilson*, 316 F.3d 506, 512 (4th Cir. 2003); *United States v. Simon*, 168 F.3d 1271, 1272 (11th Cir. 1999); *United States v. Cabrera-Sosa*, 81 F.3d 998, 1000 (10th Cir. 1996); and *United States v. Restrepo-Aguilar*, 74 F.3d 361, 364 (1st Cir. 1996).

possession of cocaine, in violation of THS §481.115. App. at p. 3. Both offenses were state felonies, but, under the categorical approach, would have been misdemeanors under the CSA. Both Petitioners received probation. App. at pp. 13 and 26. For policy reasons, in 1997, when Mr. Acosta entered his plea, such rehabilitative treatment was not even treated as a conviction for immigration purposes.[6] By the time of Mr. Galindo's plea, in 2002, it was a conviction, and, in the Fifth Circuit, an aggravated felony. *United States v. Hernandez-Avalos,* 251 F.3d 505 (5th Cir. 2001).

In Mr. Acosta's case, the Immigration Judge ("IJ"), terminated proceedings on the basis of *Matter of Manrique, supra.* INS appealed, and the BIA granted the appeal, remanding to allow Mr. Acosta to pursue his application for cancellation of removal. Citing *Hernandez-Avalos,* the IJ concluded on remand that the offense was an aggravated felony, and ordered removal. The BIA adopted this finding. App. at pp. 20, 26 and 30. Mr. Acosta filed a timely petition for review. On February 15, 2006, Respondent filed a motion to dismiss for lack of jurisdiction, in part, and for summary affirmance, in part. On February 17, 2006, Mr. Acosta filed his opposition to that motion. On March 16, 2006, he also filed an unopposed motion for a stay of deportation until the final mandate was issued.

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[6] *See, Matter of Manrique,* 21 I&N Dec. 58 (BIA 1995) (holding that for policy reasons, rehabilitative treatment for a first-time drug possession offense would not be considered to be a conviction). In *Matter of Roldan,* 22 I&N Dec. 512 (BIA 1999), the BIA abrogated *Matter of Manrique. See also, Matter of L-G-,* 21 I&N Dec. 89 (BIA 1995) (confirming earlier BIA decisions adopting the so-called "hypothetical federal felony test" for determining whether a state drug conviction was an aggravated felony).

Later that day, however, the Fifth Circuit granted Respondent's motion to dismiss and for summary affirmance. The Court then declined to take action on Petitioner's unopposed motion for a stay of removal, because the case was "closed." App. at pp. 17, 19 and 41.

In Mr. Galindo's case, the IJ found the offense to be an aggravated felony, also on the basis of *Hernandez-Avalos,* and ordered removal. The BIA affirmed. Mr. Galindo filed a timely petition for review. On November 7, 2005, Respondent filed a motion to dismiss for lack of jurisdiction, to which Mr. Galindo filed an opposition on November 14, 2005. On November 15, 2005, an unopposed motion was granted, consolidating Mr. Galindo's case with a series of similar cases, No. 05-60593. Petitioners' brief on the merits in that series was filed December 15, 2005. App. at pp. 2-3, 9-11, 36-39. In it, they urged that: 1) a state felony conviction for simple possession of a controlled substance is not an aggravated felony; 2) the context, plain meaning, and legislative history of 8 U.S.C. §1101(a)(43) and 18 U.S.C. §924(c) show that they were intended to include only "drug trafficking" offenses, not offenses involving simple possession, which would be punishable as misdemeanors under federal law; 3) under *Jerome v. U.S.,* 318 U.S. 101 (1943), the phrase "any felony" in 18 U.S.C. §924(c)(2) presumptively refers only to offenses which would be felonies under federal law; and 4) the construction urged by Petitioners is also mandated by the vagueness doctrine, the rule on lenity, and the maxim of constitutional avoidance, and international law.

However, on January 12, 2006, the Fifth Circuit dismissed Mr. Galindo's petition for lack of jurisdiction. A similar motion with respect to the remaining cases in the

consolidated series was denied on March 15, 2006.[7] A motion to reconsider the dismissal of Mr. Galindo's petition was filed March 2, 2006. Although the Government never responded, the Court had not ruled on the motion as of the filing of the instant petition. App. at pp. 1 and 40.

D. FIFTH CIRCUIT PRECEDENT

The Fifth Circuit first held that state felony drug convictions were aggravated felonies in the context of the Sentencing Guidelines in *Hinojosa-Lopez*, 130 F.3d at 693-94:

> Although this is an issue of first impression before this court, it has been addressed by several other circuits. In United States v. Restrepo-Aguilar, 74 F.3d 361 (1st Cir.1996), the First Circuit held that the defendant's prior state conviction for simple possession of cocaine qualified as an aggravated felony under §2L1.2(b)(2) despite the fact that the same offense was punishable only as a misdemeanor under federal law. Id. at 364-65. Looking to the interaction between the Sentencing Guidelines and the applicable federal statutes, the court held that 18 U.S.C. §924(c)(2) defines a "drug trafficking crime" as "encompassing two separate elements: (1) that the offense be punishable under the Controlled Substances Act (or one of the other two statutes identified); and (2) that the offense be a felony." Id. at 364. The court then explained that a state drug offense is properly deemed a "felony" within the meaning of 18 U.S.C. §924(c)(2) as incorporated by application note 7 to U.S.S.G. s 2L1.2, if the offense

[7] *See* Fifth Circuit Docket Sheet in No. 05-60593, *available in* PACER.

> is classified as a felony under the law of the relevant state, even if the same offense would be punishable only as a misdemeanor under federal law. Id. at 365. As the defendant's prior conviction was a felony under applicable state law and was punishable under the Controlled Substances Act, the court held that s 2L1.2(b)(2) applied. Id.

The Court further justified the result on the basis of the "plain" meaning of the phrase "any felony punishable under [the CSA]," and extended it to removal cases in *Hernandez-Avalos*, 251 F.3d at 510:

> [T]he plain language of the statutes "indicate[s] that Congress made a deliberate policy decision to include as an 'aggravated felony' a drug crime that is a felony under state law but only a misdemeanor under the [Controlled Substances Act]," *Briones-Mata,* 116 F.3d at 310, and that the lack of a uniform substantive test for determining which drug offenses qualify as "aggravated felonies" "is the consequence of a deliberate policy choice by Congress" that the BIA and the courts cannot disregard. *Restrepo-Aguilar,* 74 F.3d at 366.

Having found a "plain meaning," the Court neither applied the presumption of *Jerome v. U.S., supra*, nor examined the history of 8 U.S.C. §1101(a)(43)(B) or 18 U.S.C. §924(c) for evidence of Congressional intent.[8]

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[8] One might infer that the command in *Jerome* that a Court look for evidence of Congressional intent as to uniformity requires *some* examination of the legislative history, and on finding indications that Congress *did* intend uniformity, a more in-depth analysis of the statutory language to see if it could support a construction consistent with that intent.

VI. REASONS FOR GRANTING THE WRIT

A. IT IS IMPORTANT TO DETERMINE THE SCOPE OF JURISDICTION UNDER THE REAL ID ACT OF 2005

There appears to be confusion within the Fifth Circuit itself as to whether it has jurisdiction to hear such cases under 8 U.S.C. §1252(a)(2)(D). Although it is impossible to discern the reasoning of the Court where, as here, petitions are dismissed on motion, it is crucial to determine whether the Fifth Circuit had jurisdiction to review the issues of law and constitutional questions presented herein, particularly since such review was vested solely in the appellate courts, in lieu of habeas review, by the REAL ID Act, Pub. L. No. 109-13, Div. B, §106(a), 119 Stat. 231 (2005). *See, Swain v. Pressley*, 430 U.S. 372 (1977) (substitution of a collateral remedy that is neither inadequate nor ineffective to determine the legality of petitioner's custody does not constitute a suspension of the writ of habeas corpus). This issue is particularly important insofar as this Court recently reaffirmed that habeas review of removal orders is protected by the Suspension Clause. *See, INS v. St. Cyr, supra,* 533 U.S. at 298-314.

B. THE FIFTH CIRCUIT'S APPROACH TO DETERMINING WHETHER A CONTROLLED SUBSTANCE OFFENSE IS AN AGGRAVATED FELONY CONFLICTS WITH THAT OF THE SECOND, THIRD, SIXTH, SEVENTH AND NINTH CIRCUITS

As shown above, the approach of the Fifth Circuit is premised on its finding that there is only one "plain meaning" of the statutes involved. Consequently, the Court has declined to look for evidence of Congressional intent in

the history of either 8 U.S.C. §1101(a)(43)(B) or 18 U.S.C. §924(c). In *Gonzales-Gomez, supra,* at *3, the Seventh Circuit rejected this reading as "strained." Other Courts, notably the Third and Sixth Circuits, have found that the operative language of 18 U.S.C. §924(c)(2) ("any felony punishable under [the CSA]"), supports two interpretations. In effect, the Sixth Circuit found in *Palacios-Suarez* that it had not one, but *two* "plain" meanings: "[E]ither the 'hypothetical federal felony' interpretation or the 'guideline approach' could be supported by the plain meaning of the statute," *id.* at 698. Similarly the Court in *Gerbier* noted the two approaches. Both Courts resolved the conflict in favor of the "hypothetical federal felony" test.

Nor does the conflict among the circuits end there. Based largely on the presumption favoring uniformity in the administration of the immigration laws, and the absence of any indications of a contrary intent, the Ninth Circuit held in *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d at 910-18, that for immigration purposes, it would follow the approach of the Third Circuit, notwithstanding that it had reached a contrary conclusion in the context of the Sentencing Guidelines, *United States v. Ibarra-Galindo*, 206 F.3d 1337, 1339-40 (9th Cir. 2000) (holding that a state drug felony can be an aggravated felony for Sentencing Guidelines purposes, even if the same conduct would not constitute a felony under federal law). In *United States v. Fernandez*, 388 F.3d 1199 (9th Cir. 2004), the Court explained its dual approach, *id.* at 1259, n.44, noting that:

> [T]he need for national uniformity is not as compelling in the context of criminal law – which has been traditionally a subject of state law – as it is in other contexts which are regulated primarily by the federal government.

The twists in Second Circuit precedent are even more complex, and were resolved by a similar decision, concluding that such an offense is an aggravated felony under the USSG, but not for purposes of the immigration laws. *United States v. Pornes-Garcia,* 171 F.3d 142 (2nd Cir. 1999).

This Court regularly grants certiorari to resolve circuit conflicts over the meaning of the immigration laws. *See, e.g., Clark v. Martinez,* 125 S.Ct. 716, 722 (2005); *Leocal v. Ashcroft,* 543 U.S. 1 (2004); *Demore v. Kim,* 538 U.S. 510, 516 (2003). *See also,* Rules of the Supreme Court, Rule 10(a). Indeed, the Solicitor General has already agreed in *Lopez v. Gonzales, supra,* that a grant of *certiorari* is appropriate to resolve this conflict. Moreover, the impact on LPRs such as the Petitioners herein is profound. *See, Bridges v. Wixon,* 326 U.S. 135, 145 (1945) (emphasis added):

> Here the liberty of an individual is at stake. . . . Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty – at times a most serious one – cannot be doubted. *Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.*

Nor is the number of individuals affected by the issue trivial. In the Fifth Circuit alone, nearly thirty such cases are still pending. Further, as in *Leocal v. Ashcroft, supra,* the issue is also presented in the context of the Sentencing Guidelines. As noted above, note 1, *supra,* at least four petitions for certiorari presenting the same or related

issues are currently pending, including three to the Fifth Circuit.

C. THE APPROACH OF THE FIFTH CIRCUIT CREATES GREAT DISPARITIES IN THE ADMINISTRATION OF THE IMMIGRATION LAWS

The decisions of the Fifth – and Eighth – Circuits do not seriously attempt to reconcile their holdings with the longstanding policy of ensuring uniform application of the immigration laws. Their approach has caused huge disparities – and inequities – in the administration of the immigration laws. Under that approach, noncitizens convicted of like offenses may be subject to different rules for asylum,[9] naturalization,[10] cancellation of removal,[11] and many other aspects of immigration law, simply because their convictions occurred in different states.[12] These

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[9] An applicant who has been convicted of an aggravated felony is ineligible for asylum. 8 U.S.C. §1158(b)(2)(B)(i).

[10] An LPR convicted of an aggravated felony on or after November 29, 1990 is ineligible for naturalization. 8 U.S.C. §1427(a). *See also,* Immigration Act of 1990, §509 (conviction of aggravated felony as a bar to showing good moral character applies to convictions entered on or after effective date of amendment).

[11] 8 U.S.C. §1229b(a)(3) (LPRs convicted of aggravated felonies are ineligible for cancellation of removal).

[12] For example, in Texas, possession of any "visible and measurable" amount of cocaine is a felony. Texas Health & Safety Code §§481.102(3)(D) and 481.115; *Kemp v. State*, 861 S.W.2d 44 (TX App. 14 Dist. 1993) ("specks" of white powder in baggie, weighing .5 milligrams, sufficient to sustain a conviction). By contrast, as noted in *Shackleford v. State*, 261 Ark. 721, 722 (Ark. 1977), possession of cocaine is only a misdemeanor under Ark. Stat. Ann. §82-2617.

inequities have constitutional dimensions. As noted in *Gerbier,* 280 F.3d at 311:

> As Alexander Hamilton wrote, the power over naturalization must "necessarily be exclusive; because if each State had power to prescribe a Distinct Rule there could be no Uniform Rule." The Federalist No. 32 (Alexander Hamilton). Indeed, the policy favoring uniformity in the immigration context is rooted in the Constitution. *See* U.S. Const. art. I, §8 ("The Congress shall have the Power To . . . establish a uniform Rule of Naturalization.")

Congress expressly recognized the policy of uniformity in the immigration laws when it enacted the Immigration Reform and Control Act of 1986, stating: "It is the sense of the Congress that . . . the immigration laws of the United States should be enforced vigorously and uniformly." P.L. No. 99-603 §115, 100 Stat. 3359, 3385 (1986). The courts of appeals have often recognized the importance of uniform enforcement of the immigration laws. *See, e.g., Jaramillo v. INS*, 1 F.3d 1149, 1166 (11th Cir. 1993):

> The laws that we administer and the cases we adjudicate often affect individuals in the most fundamental ways. We think that all would agree that to the greatest extent possible our immigration laws should be applied in a uniform manner nationwide. . . .

See also, Cazarez-Gutierrez, 382 F.3d at 912; *Gerbier*, 280 F.3d at 299; *Aguirre*, 79 F.3d at 317; *Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1091 (7th Cir. 1994) ("National uniformity in the immigration and naturalization laws is paramount: rarely is the vision of a unitary nation so

pronounced as in the laws that determine who may cross our national borders and who may become a citizen").

D. THE "PLAIN MEANING" APPROACH OF THE FIFTH CIRCUIT OVERLOOKS CLEAR EVIDENCE THAT CONGRESS DID NOT INTEND FOR VARIATIONS IN STATE LAW TO UNDERMINE THE UNIFORM ENFORCEMENT OF THE IMMIGRATION LAWS

1. The "Plain Meaning"

The Fifth Circuit's construction of §1101(a)(43)(B) initially arose in the context of the USSG. It was based on a conclusion that the phrase "any felony punishable under [one of three federal statutes]" had a "plain" meaning, because of the manner in which the Controlled Substances Act defines "felony." *See, U.S. v. Hernandez-Avalos,* 251 F.3d at 509-10. Having found a single "plain meaning," the Fifth Circuit neither applied the *Jerome* presumption in favor of uniformity, nor examined the history of §924(c) and §1101(a)(43)(B) to determine whether Congress actually *intended* uniformity. Nor did that Court consider either the statutory analysis, or the policy considerations, leading to the BIA's contrary construction in *Matter of L-G-*, 21 I&N Dec. 89 (BIA 1995).

2. The Context

As this Court noted in *Leocal v. Ashcroft,* 125 S.Ct. at 382, statutory language must be construed "in its context and in light of the terms surrounding it."[13] It is therefore

[13] *See also, Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the

(Continued on following page)

significant that §1101(a)(43)(B) references *all of* §924(c), *not just* §924(c)(2). Thus, at a minimum, the remainder of §924(c) provides *context* for the definition of "drug trafficking" as an aggravated felony, to wit, drug trafficking offenses involving the carrying or use of deadly weapons during the commission of the crime. This, plus the ordinary meaning of the terms used in §1101(a)(43)(B), which defines an *aggravated* felony involving *trafficking* in controlled substances, rather than just *any* such felony, including simple possession, indicates that it was intended to apply only to serious offenses bearing some relationship to drug trafficking. Isolating the term "felony" in §924(c), and construing it by reference to the definition of "felony" in one of the three federal statutes involved, rather than in its context, and without considering the legislative history, has produced an absurd result: even remedial dispositions of first time charges of possession of a controlled substance are considered "drug trafficking" offenses, and thus *aggravated* felonies. Further, as shown below, *infra* at VI(D)(4) and (5), examination of the historical *context* of both 18 U.S.C. §924(c)(2), and 8 U.S.C. §1101(a)(43) yields the same result.

3. Under *Jerome v. U.S.*, 318 U.S. 101 (1943), the Phrase "Any Felony" As Used in 18 U.S.C. §924(c)(2) Presumptively Refers Only to Offenses Which Would Be Felonies under Federal Law

Jerome v. U.S., supra, involved a situation almost identical to that of Petitioners. The statute at issue

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words of a statute must be read in their context and with a view to their place in the overall statutory scheme").

therein, §2(a) of the Bank Robbery Act (12 U.S.C. §588b (1943)), provided that:

> [W]hoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

The defendant was convicted under this statute for entering a bank with the intent to defraud it by uttering a forged promissory note: a felony under state, but not federal, law. This Court held that the statutory phrase "any felony" referred only to offenses which would be felonies under federal law. As the Court reasoned, *id.* at 104-105 (internal citations omitted) (emphasis added):

> At times it has been inferred from the nature of the problem with which Congress was dealing that the application of a federal statute should be dependent on state law. . . . But we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law.

As the Third, Sixth, and Seventh Circuits concluded in *Gerbier, Palacios-Suarez,* and *Gonzales-Gomez,* the histories of §924(c)(2) and §1101(a)(43)(B) are not only devoid of any indication that Congress intended the definition of "felony" to depend on state law, they affirmatively show the contrary.

4. The History of 18 U.S.C. §924(c)

Previously, §924(c)(2) defined drug trafficking crime as "any *felony violation of Federal law* involving the distribution, manufacture, or importation of any controlled substance (as defined in [21 U.S.C. §802])." P.L. No. 99-308 §104(a)(2)(F), 100 Stat. 449, 457 (1986) (emphasis added). The current definition was enacted by the Anti-Drug Abuse Act of 1988, in a provision entitled "*Clarification* of Definition of Drug Trafficking Crimes." P.L. No. 100-690 §6212, 102 Stat. 4181, 4360 (1988) (emphasis added). That *clarification* simply specified which federal statutes qualify as "drug trafficking crime[s]." Where the prior definition spoke in general terms about "Federal law involving the distribution, manufacture, or importation of any controlled substance," Pub. L. No. 99-308 §104(a)(2)(F), 100 Stat. at 457 (1986), the new language clarified that §924(c) applies only to violations of three specific statutes: the Controlled Substances Act (21 U.S.C. 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*), and the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 *et seq.*).[14] As observed in *Palacios-Suarez*, 418 F.3d at 699 (quoting *Cazarez-Gutierrez*, 382 F.3d at 915):

> [T]here is nothing in the legislative history [of 18 U.S.C. §924(c)] to suggest that Congress intended this "clarification" to dramatically widen the scope of "drug trafficking crime" to include simple drug possession offenses that would not be punishable as felonies under federal law.

See also, Gerbier, supra at 308-309; *Gonzales-Gomez, supra* at *6.

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[14] P.L. No. 100-690 §6212, 102 Stat. at 4360 (1988).

5. The History of 8 U.S.C. §1101(a)(43)(B)

The history of 8 U.S.C. §1101(a)(43)(B) also confirms that Congress did not intend the construction adopted by those circuits, including the Fifth and Eighth, which have adopted the so-called "Guidelines approach." The Immigration and Nationality Act was amended by the Anti-Drug Abuse Act of 1988 to add several provisions relating to aliens convicted of aggravated felonies,[15] which was then defined as follows:

> The term "aggravated felony" means murder, any drug trafficking crime as defined in section 924(c)(2) of title 18, United States Code, or any illicit trafficking in any firearms or destructive devices as defined in section 921 of such title, or any attempt or conspiracy to commit any such act, committed within the United States.

In *Matter of Barrett*, the issue arose of whether this included state convictions which would be punishable as felonies under 18 U.S.C. §924(c)(2). The alien therein had been convicted by the State of Maryland of three types of drug offenses. The IJ held that because they were state convictions, none was an aggravated felony. INS appealed, arguing that the counts charging *possession with intent* were aggravated felonies. *Barrett,* 20 I&N Dec. at 173.

The BIA concurred, concluding, *id.* at 175 (emphasis added), that:

> If Congress had wanted only convictions under the cited federal statutes to serve as aggravated felonies with respect to drug offenses, it could have said so quite simply. Instead Congress

[15] P.L. No. 100-690, 102 Stat. 4181 (1988).

> referred to felonies "punishable under" not "convictions obtained under" those statutes. As such, we find that the definition of "drug trafficking crime" at 18 U.S.C. §924(c)(2), as incorporated into the Immigration and Nationality Act by section 101(a)(43) of the Act, **includes a state conviction sufficiently analogous to a felony offense under the Controlled Substances Act**, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act.

Among the factors considered in reaching this conclusion was the INS' argument favoring uniform administration of the immigration laws. *Id.* at 176, n.7.

Shortly after *Barrett* was decided, Congress added language to §1101(a)(43) specifying that it applied to "an offense described in this paragraph whether in violation of Federal or State law." As explained by the House Judiciary Committee (emphasis added):[16]

> Current law clearly renders an alien convicted of a Federal drug trafficking offense an aggravated felon. It has been less clear whether a state drug trafficking conviction brings that same result, *although the Board of Immigration Appeals in Matter of Barrett (March 6, 1990) has recently ruled that it does. Because the Committee concurs with the recent decision of the Board of Immigration Appeals* and wishes to end further litigation on this issue, section 1501 of H.R. 5269 specifies that drug trafficking (and firearms/destructive device trafficking) is an

[16] H.R. Rep. No. 101-681, pt. 1, at 147 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6553.

> aggravated felony whether or not the conviction occurred in state or Federal court.

This ensured that the definition applied to *felony* offenses *described by* the pertinent sections of federal law, whether prosecuted by federal, or state, authorities.

6. The Construction Urged Herein Is Also Mandated by the Rule on Lenity, the Vagueness Doctrine, and the Maxim of Constitutional Avoidance

The profound split among the circuits reveals a degree of ambiguity in the statutes at issue. As noted in *Leocal,* 125 S.Ct. at 384, statutes carrying both criminal and immigration consequences are subject to the rule on lenity, "Even if [18 U.S.C.] §16 lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in petitioner's favor." *See also, INS v. Cardoza-Fonseca,* 480 U.S. 421, 449 (1987) (holding that any "lingering ambiguities" in a deportation statute must be resolved in the alien's favor). Further, as held in *Jordan v. DeGeorge,* 341 U.S. 223, 231 (1951), the vagueness doctrine applies to deportation statutes, "in view of the grave nature of deportation." The maxim of constitutional avoidance also supports the result urged herein, in that a contrary construction would violate both Equal Protection and Due Process.[17]

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[17] It is beyond dispute that deportation implicates liberty interests. *See, Bridges v. Wixon, supra. See also, Landon v. Plasencia,* 459 U.S. 21, 32 (1982):

> This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the

(Continued on following page)

E. THE QUESTION PRESENTED WILL NOT BENEFIT FROM FURTHER CONSIDERATION IN THE COURTS OF APPEALS

To date, seven circuits have addressed the issue of whether a state law felony that would be punishable as a misdemeanor under federal law is a "drug trafficking crime" under 18 U.S.C. §924(c)(2) for purposes of the immigration laws. Five have concluded that it is not such an offense, while two have held that it is. Four other circuits have considered the question in the context of the Sentencing Guidelines. *See supra*, Notes 3, 4 & 5.

The BIA has also considered various facets of the issue. Beginning with *Matter of Barrett, supra,* they consistently followed the "hypothetical federal felony" approach, until forced to change course as the courts of appeals reached different conclusions. *See, In re Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002) (recognizing that "uniformity is presently unattainable"); *In re K-V-D*, 22 I&N Dec. 1163 (BIA 1999); *In re L-G-, supra*; *In re Davis*, 20 I&N Dec. 536 (BIA 1992); *Matter of Barrett, supra*.

The decisions of the courts of appeals and the BIA have examined the text of the statutes in question, their legislative history, and policy considerations favoring uniformity in enforcing the immigration laws. Further decisions are thus unlikely to yield significant new analysis. The circuits have staked out their positions, and framed the issue for this Court's resolution.

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power to admit or exclude aliens is a sovereign prerogative. . . . [H]owever, once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.

VII. CONCLUSION

For the foregoing reasons, it is respectfully urged that this Court issue a writ of certiorari to the Fifth Circuit, to resolve the conflict among the circuits on this crucial point of law. Resolution of this conflict is particularly urgent in that it affects the application of both the immigration laws, and the United States Sentencing Guidelines.

Respectfully Submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-60908

RAUL GALINDO-PENA

Petitioner

v.

ALBERTO R GONZALES, U S ATTORNEY GENERAL

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

(Filed Jan. 12, 2006)

Before HIGGINBOTHAM, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that respondent's motion to dismiss the petition for review for lack of jurisdiction is [granted]

IT IS FURTHER ORDERED that respondent's alternative motion for an extension of thirty (30) days to file the administrative record from the court's ruling on the motion to dismiss is [denied as moot]

MOT-21A

[/s/ [FPB] /s/ [PEH] /s/ [JLD]]
03/09/06

U.S. Department of Justice
Decision of the Board of Immigration Appeals Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A17 765 966 – Los Fresnos Date: SEP 29 2005

In re: RAUL *GALINDO*-PEÑA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Thelma O. Garcia, Esquire

ON BEHALF OF DHS: Dona J.F. Justus
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)) – Convicted of aggravated felony

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] – Convicted of controlled substance violation

APPLICATION: Cancellation of removal

ORDER:

PER CURIAM. The respondent's appeal of the Immigration. Judge's May 5, 2005, decision finding him removable as charged and ineligible for relief from removal due to his conviction for an aggravated felony as defined by section 101(a)(43)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B), is dismissed.

The record reflects that the respondent, a native and citizen of Mexico and a lawful permanent resident of the

United States, was convicted on May 21, 2002, of the offense of simple possession of less than 1 gram of cocaine, a violation of section 481.115(a) of the Texas Health and Safety Code. The respondent's offense is classified as a "state jail felony" under Texas law. On the basis of this conviction, the Department of Homeland Security ("DHS") charged the respondent with removability as, *inter alia*, an alien convicted of an aggravated felony within the meaning of section 101(a)(43)(B) of the Act. The Immigration Judge sustained this charge, and the respondent appeals contending that his conviction is not one for an aggravated felony.

This Board has held that the determination as to whether a state drug offense qualifies as an aggravated felony must be made by reference to decisional authority from the relevant circuit court of appeals, and not by reference to our own independent standards. *See Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002). Under this rule, we look to the substantive law of the United States Court of Appeals for the Fifth Circuit to determine whether the respondent's Texas drug conviction constitutes an aggravated felony. In *United States v. Caicedo-Cuero*, 312 F.3d 697 (5th Cir. 2002), the Fifth Circuit concluded that the Texas offense of simple possession of marijuana – a "state jail felony" under Texas law – qualified as an aggravated felony because the offense was punishable under federal law, was classified as a felony by the convicting jurisdiction, and was punishable in the convicting jurisdiction by a term of imprisonment of more than 1 year.

Cocaine is a controlled substance under 21 U.S.C. § 812(c), sch. II(a)(4) (2000), and possession of a controlled substance violates federal narcotics laws, 21 U.S.C. § 844(a). Moreover, the respondent's offense was classified

as a "state jail felony" under Texas law, and therefore was punishable by a term of imprisonment of not more than 2 years nor less than 180 days. Texas. Penal Code § 12.35(a). Thus, Fifth Circuit law dictates that the respondent's Texas conviction is an aggravated felony rendering him removable from the United States and ineligible for cancellation of removal.

Accordingly, the appeal is dismissed.

/s/ Lauri Steven Filppu
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Port Isabel, Texas

File A 17 765 966 May 5, 2005

In the Matter of

RAUL GALINDO-PENA,	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	

CHARGES: Section 237(a)(2)(A)(iii), Immigration and Nationality Act;

Section 237(a)(2)(B)(i), Immigration and Nationality Act.

APPLICATIONS:

ON BEHALF OF RESPONDENT:	ON BEHALF OF DEPARTMENT OF HOMELAND SECURITY:
Thelma O. Garcia, Esquire	Dyann Bernstein, Esquire Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The Department of Homeland Security issued a Notice to Appear with respect to the respondent on January 27, 2005 and properly served it upon him (Exhibit 1). The Notice to Appear alleges that the respondent is not a citizen or national of the United States and that he is a native and citizen of Mexico who was admitted to the United States at Hidalgo, Texas on or about January 8, 1968 as an immigrant.

It is further alleged that on May 21, 2002, the respondent was convicted in the 107th District Court of Cameron

County, Texas for the offense of possession of the controlled substance cocaine in violation of the Texas Penal Code, and that he was for this offense sentenced to two years confinement, suspended for five years of probation. The Notice to Appear charges that the respondent is subject to removal from the United States under Sections 237(a)(2)(A)(iii) and 237(a)(2)(B)(i) of the Immigration and Nationality Act (the Act). The respondent, through counsel, has denied all of the allegations of fact in the Notice to Appear and has also denied removability under both charges.

The Department of Homeland Security has the burden to prove by clear and convincing evidence that the respondent is subject to removal as charged in the Notice to Appear. See Section 240(c)(3)(A) of the Act. The Department of Homeland Security offered into the record an immigrant visa, an alien registration document issued by the United States of America with respect to Raul Galindo-Pena (Exhibit 2). That document was admitted without objection. This document states that the nationality of Raul Galindo-Pena is "Mexican". Further it shows that Raul Galindo-Pena, the respondent, was admitted to the United States as a permanent legal resident alien on January 8, 1968 at Hidalgo, Texas in the immigrant classification "SA-1".

The Court concludes that the immigrant visa and alien registration document establishes by clear and convincing evidence that the respondent is an alien within the meaning of Section 101(a)(3) of the Act which defines the term alien to mean any person not a citizen or national of the United States. Since the immigrant visa and alien registration document shows that the respondent's nationality is "Mexican" and that he was admitted into the United States on January 8, 1968, as a permanent legal

resident alien, this document establishes by prima facie evidence that the respondent is an alien within the meaning of Section 101(a)(3) of the Act.

The respondent has not come forward with any evidence to rebut that prima facie showing of alienage. Accordingly, the Court concludes that the record shows by clear and convincing evidence that the respondent is not a citizen or national of the United States and that he is a native and citizen of Mexico who was admitted to the United States at Hidalgo, Texas on or about January 8, 1968 as an immigrant. *See Matter of Tijerina-Villareal*, 13 I&N Dec. 327, 330 (BIA 1969).

The Department of Homeland Security also offered into the record a judgement of conviction in the case of the *State of Texas V. Raul Galindo.* The Department of Homeland Security also offered into the record the indictment relating to that judgment. The record of that criminal proceeding was admitted into the record of this removal proceeding as Group Exhibit 3 and it was admitted into the record without objection. The respondent's counsel stated that the respondent did not appeal that judgement in Group Exhibit 3.

The indictment in that criminal proceeding charges that the respondent, on or about September 10, 2001 intentionally or knowingly possessed a controlled substance, namely cocaine, in an amount of less than 1 gram. The judgement of conviction shows that the respondent pled guilty to that offense of possession of a controlled substance as charged in the indictment. The court adjudged the respondent to be guilty of that offense and sentenced him to two years of confinement in a state jail facility. However the court suspended the imposition of

that sentence and placed the respondent on five years of community supervision.

The judgement of conviction establishes by clear and convincing evidence that the respondent was convicted, within the meaning of Section 101(a)(48)(A) of the Act, of the offense of possession of cocaine. The judgement of conviction shows that that is a state jail felony under Texas law. Therefore the Court concludes that the Department of Homeland Security has established by clear and convincing evidence that allegations 4 and 5 in the Notice to Appear are true. Accordingly, the record establishes that all five allegations of fact in the Notice to Appear are true, and the Court concludes that the truth of each of those allegations has been established by clear and convincing evidence.

The Notice to Appear charges that the respondent is subject to removal from the United States under Section 237(a)(2)(A)(iii) of the Act in that at any time after admission respondent has been convicted of an aggravated felony as defined in Section 101(a)(43)(B) of the Act.

Section 237(a)(2)(A)(iii) of the Act states that "any alien who is convicted of an aggravated felony at any time after admission is deportable." Section 101(a)(43)(B) of the Act defines an aggravated felony as "illicit trafficking in a controlled substance (as defined in Section 102 of the Controlled Substance Act) including a drug trafficking crime (as defined in Section 924(c) of Title 18 U.S.C.)."

Since this Court presides within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, this Court must apply that circuit court's interpretation of what constitutes a drug trafficking crime under 18 United

States Code Section 924(c)(2). *See Matter of Yanez*, 23 I&N Dec. 290 (BIA 2002).

The United States Court of Appeals for the Fifth Circuit has held that an offense is a drug trafficking crime under 18 United States Code Section 924(c)(2) if it is punishable under the Federal Controlled Substances Act and it is a felony under either state or federal law pursuant to the law of the prosecuting jurisdiction. In the present case, the prosecuting jurisdiction is the State of Texas and therefore the relevant inquiry is whether the respondent's offense is a felony under Texas law and whether it is an offense that is punishable under the Federal Controlled Substances Act. *See United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Circ. 2001), *cert. denied*, 534 U.S. 935 (2001).

In the present case, the judgement of conviction shows the respondent was convicted of a state jail felony under Texas law. Therefore he was convicted of a felony under the law of the prosecuting jurisdiction. Further, the respondent's offense of possession of cocaine is an offense that is punishable under the Federal Controlled Substances Act pursuant to 21 United States Code Section 848(a). Accordingly, the Court concludes that the respondent's conviction for possession of cocaine constitutes a conviction for a drug trafficking crime as defined in Section 924(c) of Title 18, United States Code, and is therefore an aggravated felony under Section 101(a)(43)(B) of the Act. *See Matter of Salazar*, 23 I&N Dec. 223 (BIA 2002). Consequently, the Court concludes that the record establishes by clear and convincing evidence that the respondent is removable as charged under Section 237(a)(2)(A)(iii) of the Act.

The Court further concludes that the record establishes by clear and convincing evidence that the respondent is subject to removal under Section 237(a)(2)(B)(i) of the Act. The respondent, after admission, has been convicted of a violation of the law of the State of Texas relating to a controlled substance as defined in Section 102 of the Controlled Substances Act, 12 United States Code 802 other than a single offense involving possession for one's own use of 30 grams or less of marijuana. The respondent's conviction for the possession of cocaine occurred after his admission to the United States. Cocaine is a controlled substance, as defined in Section 102 of the Controlled Substances Act, 21 United States Code 802, other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

The respondent's conviction for the possession of cocaine occurred after his admission to the United States. Cocaine is a controlled substance as defined in Section 102 of the Controlled Substances Act. With respect to the aggravated felony under Section 237(a)(2)(A)(iii) of the Act, the record is also clear that the conviction for possession of cocaine after the respondent was admitted to the United States. Accordingly, the Court concludes that the respondent is subject to removal under both charges in the Notice to Appear.

The respondent declined to select a country of removal if removal is ordered. The Court designated the respondent's native country of Mexico as the country for removal if removal is ordered.

The respondent initially requested to be allowed to file an application for withholding of removal under Section 241(b)(3) of the Act and withholding of removal or deferral

of removal pursuant to the Convention Against Torture. It is noted that the respondent would not be eligible to apply for asylum under Section 208 of the Act because he has been convicted of an aggravated felony. See Section 208(b)(2)(A)(ii) and 208(b)(2)(B)(i) of the Act.

The respondent was given the opportunity to file his application for withholding of removal under Section 241(b)(3) of the Act and withholding of removal and deferral of removal pursuant to the Convention Against Torture. The respondent subsequently withdrew his request to apply for withholding of removal and did not file any application for relief from removal. It does not appear from the record that the respondent is eligible to apply for any other relief from removal. He would not be eligible for cancellation of removal for certain permanent residents under Section 240A(a) of the Act because he has been convicted of an aggravated felony. See Section 240A(a)(3) of the Act. Therefore an order of removal is warranted in this case.

ORDER

WHEREFORE IT IS HEREBY ORDERED that the respondent be removed from the United States to Mexico pursuant to the charges of removability stated in the Notice to Appear.

Dated this 5th day of May 2005.

HOWARD E. ACHTSAM
Immigration Judge

U.S. Department Of Justice **Notice to**

Immigration and Naturalization Service **Appear**

In removal proceedings under section 240 of the Immigration and Nationality Act

File No: **A17 765 966**

In the Matter of:

Respondent: **GALINDO-Peña, Raul** Currently residing at: PISPC, Route 3, Box 341, Los Fresnos, Texas 78566 (Number, street, city, state and ZIP code) **(956) 547-1700** (Area code and phone number)

☐ 1. You are an arriving alien.

☐ 2. You are an alien present in the United States who has not been admitted or paroled.

☒ 3. You have been admitted to the United States, but are deportable for the reasons stated below.

The Service alleges that you:

1. You are not a citizen or national of the United States;

2. You are a native of Mexico and a citizen of Mexico;

3. You were admitted to the United States at Hidalgo, Texas on or about January 8, 1968, as an immigrant;

4. You were, on May 21, 2002, convicted in the 107th District Court of Cameron County, Texas, for the offense of POSSESSION OF A CONTROLLED SUBSTANCE, to wit: COCAINE, in violation of the Texas penal code;

5. You were for this offense sentenced to two (2) years confinement, suspended for five (5) years probation; On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 237(a)(2)(B)(iii) of the Immigration and Nationality Act (Act), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in Sections 101(a)(43)(B) of the Act, to wit: POSSESSION OF A CONTROLLED SUBSTANCE, to wit: COCAINE:

SECTION 237(a)(2)(B)(i) of the Immigration and Nationality Act (Act), as amended, in that, at any time after admission, you have been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of Controlled Substances Act [21 U.S.C. 802]), other than a single offense involving possession for one's own use of 30 grams or less of marijuana;

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution.

☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8 CFR 208.30(f)(2) ☐ 8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at: Executive Office for Immigration Review, 201 East Jackson, Harlingen, Texas 78550 (Complete Address of Immigration Court, Including Room Number, if any) on TO BE SET (Date) at TO BE SET (Time) to show why you should not be removed from the United States based on the charge(s) set forth above

/s/ [Illegible]
Supervisory Special Agent
(Signature and Title of Hearing Officer)

Harlingen, Texas
(City and State)

Date: January 27, 2005

SEE REVERSE FOR IMPORTANT INFORMATION

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so chose [sic], you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at not [sic] cost will be provided with this Notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language,

you must bring the original and a certified English translation of the document. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or deportable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have the right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear, of any relief from removal for which you may appear eligible including the privilege of departing voluntarily. You will be given reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the INS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide and [sic] address at which you may be reached during proceedings then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the

Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to have a 10-day period prior to appearing before an immigration judge.

_____
(Signature of Respondent)

Before: Date: _____

_____
(Signature and Title of INS Officer)

Certificate of Service

This Notice to Appear was served on the respondent by me on 01-27-05 (date), in the following manner and in compliance with section 239(a)(1)(F) of the Act;

[Fingerprint Omitted in Printing]

☒ in person ☐ by certified mail ☐ by regular mail

☒ Attached is a list of organizations and attorneys which provide free legal services.

☒ The alien was provided oral notice in the **SPANISH** language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

/s/ Raul Galindo	/s/ [Illegible]
Raul Galindo	Special Agent

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-60011

ALFONSO ACOSTA-GRIMALDO

Petitioner

v.

ALBERTO R GONZALES, U S ATTORNEY GENERAL

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

(Filed Mar. 16, 2006)

Before BARKSDALE, STEWART, and CLEMENT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that respondent's motion to dismiss petition for review for lack of jurisdiction in part is [GRANTED].

IT IS FURTHER ORDERED that respondent's motion for summary affirmance in remaining part is [GRANTED].

IT IS FURTHER ORDERED that respondent's alternative motion for an extension of thirty (30) days after

disposition of motions to dismiss and remand in which to file the administrative record is [DENIED as moot].

[/s/ [RHB] /s/ [CES] /s/ [EBC]]
03/09/06

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-310-7700
600 CAMP STREET
NEW ORLEANS, LA 70130

NOTICE: The clerk's office is moving permanently to 600 S. Maestri Place, New Orleans, LA 70130 on **April 24, 2006**. All correspondence expected to arrive at the court on or after April 24, 2006 must be sent to this address.

March 16, 2006

Ms Lisa S Brodyaga
Refugio de Rio Grande
17891 Landrum Park Road
San Benito, TX 78586

Mr Luis Enrique Perez
US Department of Justice
Civil Division Immigration Litigation
Suite 8033N
1331 Pennsylvania Avenue NW
Washington, DC 20004

No. 06-60011 Acosta-Grimaldo v. Gonzales
USDC No. A90 453 081

We received your motion for stay of deportation. We are taking no action on this motion as the case is closed.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: /s/ Cindy Broadhead
Cindy Broadhead, Deputy Clerk
504-310-7707

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

File: A90 453 081 – Harlingen, Texas Date: Dec. 15 2005

In re: ALFONSO ACOSTA-GRIMALDO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Andrew Taylor, Esquire

ON BEHALF OF DHS: Sean D. Clancy,
Assistant Chief Counsel

ORDER:

PER CURIAM. We adopt and affirm the conclusion of the Immigration Judge finding the respondent subject to removal as charged and statutorily ineligible for a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act. *See Matter of Burbano,* 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision"). While we adopt the legal conclusions of the Immigration Judge regarding removability and the respondent's statutory ineligibility for relief, we decline to adopt the Immigration Judge's analysis of the Court's decision in *INS v. St. Cyr*, 121 S.Ct. 2271 (2001). I.J. at 6-7. We find no ambiguity in the Court's decision as it applies to this respondent. The respondent was convicted following a plea of guilty on May 29, 1997, which was entered after the

enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. The United States Supreme Court in *INS v. St. Cyr, supra*, held that an alien is not eligible for section 212(c) relief if he has been convicted after both the effective dates of AEDPA and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA"). Accordingly, the appeal is dismissed.

/s/ Anthony C. Moscato
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Harlingen, Texas

File No.: A 90 453 081 September 27, 2004

In the Matter of	)	
ALFONSO ACOSTA-GRIMALDO	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	

CHARGE: Section 237(a)(2)(B)(i) of the Immigration and Nationality Act – removable for being an alien, who at any time after admission, has been convicted of a violation of (or a conspiracy or an attempt to violate) any law or regulation of a State, the United States, or a foreign country related to a controlled substance (as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802), other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

APPLICATION: Cancellation of removal.

ON BEHALF OF RESPONDENT:
Jonathan T. Jones, Esquire
Cynthia Chapa, Esquire
Casa De Poroyecto Libertad
113 North First Street
Harlingen, TX 78550

ON BEHALF OF DHS:
Sean Clancy, Esquire
P.O. Box 1711
Harlingen, TX 78551

ORAL DECISION OF THE IMMIGRATION JUDGE

Procedural History

The respondent, Alfonso Acosta-Grimaldo, was placed in removal proceedings by the Government on June 4, 1997. At that time, the Government filed with the Court a Notice to Appear in which, it alleged that Mr. Acosta: is not a citizen or national of the United States; is a native and citizen of Mexico; was admitted to the United States at Harlingen, Texas on or about September 22, 1989, as an immigrant; and was on May 29, 1997 convicted in the 105th Judicial District court at Kingsville, Texas for the offense of possession of marijuana. *See* Exhibit 1. The Service charged that Mr. Acosta is removable pursuant to Section 237(a)(2)(B)(i) of the Immigration and Nationality Act, in that at any time after admission, he has been convicted of a violation of (or a conspiracy or an attempt to violate) any law or regulation of a State, the United States, or a foreign country related to a controlled substance (as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802), other than a single offense involving possession for one's own use of 30 grams or less of marijuana. *Id.*

At a hearing held on June 18, 1997, Mr. Acosta, appearing pro se, admitted to all the allegations in the charging document and conceded removability. The Government offered into evidence the conviction documents pertaining to the charge in this case. Said documents were received into the record without objection from Mr. Acosta. *See* Group Exhibit 2. The matter was reset in order for Mr. Acosta to decide whether he wished to pursue relief from removal.

The case was again called on June 20, 1997. At that time, the Court was going to reconsider its earlier findings of removability based on a precedent decision by the Board of Immigration Appeals ("Board"). The matter was reset again on various occasions both in order for the Court to further consider Mr. Acosta's removability and in order for Mr. Acosta to pursue obtaining legal representation.

The matter was finally called on December 9, 1997. At that time, Mr. Acosta, appearing with counsel, affirmed his admissions to the allegations in the charging document, but withdrew his concession to the charge of removability. The Court permits a withdrawal, both because Mr. Acosta had previously appeared pro se when he conceded removability and also because it was the opinion of the undersigned Judge that he in fact was not removable as charged in the charging document. The matter was once again reset in order for the parties to submit any additional matters to the Court that they wished to have considered and in order for the Court to issue a final decision.

At a hearing held on January 29, 1998, Mr. Acosta testified briefly to matters concerning his removability. The parties thereafter rested their cases. The Court found that the offense in the instant case did not constitute "a final conviction" for purposes of Immigration law and as a result, the Court terminated these proceedings.

The Government timely appealed the Court's decision and in an order dated July 17, 2002, the Board sustained the Government's appeal and remanded the record to the Immigration Judge with instructions for the Court to afford Mr. Acosta an opportunity to apply for any relief from removal for which he may be eligible.

Mr. Acosta did file with the Court an application for cancellation of removal, although at the time he made that application, it was not clear to the Court that Mr. Acosta was actually eligible for said relief. However, said application remains in the Court's file in the event that there is an appeal taken in this matter and the Board wishes to decide whether Mr. Acosta is eligible for said relief or any other relief.

A hearing on the issue of removability as well as Mr. Acosta's eligibility for relief was commenced on April 8, 2004 and completed on September 27, 2004. The Court would note that in the Board's decision, it did find that based on a change in the law tht [sic] occurred after the Court rendered its initial decision in this matter, that Mr. Acosta had, in the opinion of the Board, been convicted of a controlled substance violation and thus was removable as charged by the Government pursuant to Section 237(a)(2)(B)(i) of the Act. Thus, in the opinion of this Court, there is no longer any question as to whether Mr. Acosta is removable as charged by the charging document. The only issue remaining before the Court is whether he is eligible for cancellation of removal or any other type of relief.

Findings of Fact

The record before the Court indicates that Mr. Acosta entered the United States at Harlingen, Texas on or about September 22, 1989. The record before the Court also indicates that on May 27, 1997, Mr. Acosta, through counsel, plead guilty to the charge of intentionally and knowingly, possessing a usable quantity of marijuana in the amount of 2,000 pounds or less, but more than 50

pounds. *See* Group Exhibit 2. On May 29, 1997, a judge entered a judgment in which he found that Mr. Acosta was guilty of the offense and that that offense constituted a third degree felony under the laws of the State of Texas. Mr. Acosta was sentenced to eight years of community supervision as a result of said offense.

Legal Conclusions and Findings of the Court

The Board of Immigration Appeals as well as the Fifth Circuit Court of Appeals have held that a respondent who has been convicted of a felony offense of possession of marijuana under the laws of the State of Texas has been convicted of an "aggravated felony". *See In re Salazar,* 23 I&N Dec. 223 (BIA 2002); *U.S. v. Hernandez-Avalos,* 251 F.3d 505 (5th Cir. 2000), *cert. denied,* 122 S. Ct. 305 (2001); and *U.S. v. Hinojosa-Lopez,* 130 F.3d 691 (5th Cir. 1997). The Court finds that the offense for which Mr. Acosta was convicted is the same offense for which Mr. Salazar was convicted. As a result, the Court finds that Mr. Acosta has been convicted of an aggravated felony. *Id.*

The Court further finds that under the Act, given that Mr. Acosta has been convicted of an aggravated felony, he is not eligible for cancellation of removal. *See* Section 240A of the Act.

The Court further finds that given that Mr. Acosta pled guilty on May 27, 1997, he is not eligible to apply for a 212(c) waiver. *See U.S. v. St. Cyr.* The Court is of the opinion that it is certainly arguable that pursuant to the Supreme Court's holding in *U.S. v. St. Cyr, supra,* Mr. Acosta may very well ultimately be found to be eligible to apply for either a 212(c) waiver or cancellation of removal, given that at the time that he pled guilty to the possession

of marijuana and given that at the time that he was actually convicted of said offense, felony possession of marijuana under Texas state law was not considered to be an aggravated felony by either the Board or by the Fifth Circuit.

Therefore, the concerns raised by the Supreme Court in *St. Cyr, supra,* concerning reliance on the state of the law at the time that an individual pled guilty, may very well be applicable in the instant proceedings. If in fact, Mr. Acosta was operating under the assumption that he was not pleading to an aggravated felony and that he would be eligible for relief, then certainly under *St. Cyr, supra,* he should, in the opinion of this Court, be permitted to pursue either a 212(c) waiver or cancellation of removal. However, there is no current case law to support the Court's opinion to the contrary. The only existing case law which has already been cited to by the Court would indicate that Mr. Acosta has been convicted of an aggravated felony under the current state law.

As a respondent who has been convicted of an aggravated felony, Mr. Acosta is not eligible for cancellation of removal, and given that the *St. Cyr* case does not address the limited question raised in this case about whether an individual should be eligible to apply for relief if an offense to which he has pled guilty is not previously considered to have been an aggravated felony, but due to a change in the interpretation of the law by the Court, a respondent is now considered to have pled guilty to an aggravated felony even though at the time of the plea, it was not an aggravated felony, whether he should be eligible for relief.

A strict reading of the *St. Cyr* case would indicate that in order to qualify under that case, Mr. Acosta would need

to have pled guilty prior to April of 1996, as opposed to May of 1997 when he entered his plea in this particular case. Nonetheless, as has been noted, the Court is of the opinion that the reason behind the Court's holding in the *St. Cyr* case as well as the ultimate outcome of the case would suggest that if Mr. Acosta were to pursue this matter, he would ultimately be found to be eligible for some type of relief. However, the Court is limited in that it is an Immigration Court and cannot take into account the different types of constitutional arguments that were raised in the *St. Cyr* case.

As a result, for reasons discussed herein, the Court is of the opinion that currently under existing law, Mr. Acosta has been convicted of an aggravated felony and as such is ineligible to pursue cancellation of removal that he has applied for, and as a result of the current state of the applicable case law, Mr. Acosta is ineligible to pursue a 212(c) waiver.

Conclusions of the Court

The Court finds that Mr. Acosta is removable under Section 237(a)(2)(B)(i) of the Immigration and Nationality Act. The Court further finds that Mr. Acosta has been convicted of an aggravated felony and is ineligible to pursue any type of relief from removal, given that he pled guilty to said offense on May 27, 1997.[1]

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[1] The Court notes that there is an indication in the Board's decision that perhaps the Board believes that Mr. Acosta is eligible for some type of relief from removal. The Court, however, has carefully reviewed the record before it and is of the opinion that unless the Board was willing to accept the view that the Court expanded in this decision

(Continued on following page)

As a result, the following order will be entered:

ORDERS

IT IS HEREBY ORDERED that Mr. Acosta *IS REMOVABLE* pursuant to Section 237(a)(2)(B)(i) of the Immigration and Nationality Act.

IT IS FURTHER ORDERED that Mr. Acosta *IS INELIGIBLE* for cancellation of removal or any other type of relief from removal.

IT IS FURTHER ORDERED that Mr. Acosta be, and is, hereby ordered *REMOVED* to his native country of Mexico.

Dated this 27th date of September 2004.

MARGARET D. BURKHART
Immigration Judge

based on its reading of *St. Cyr*, that Mr. Acosta is currently ineligible for any relief from removal, although perhaps at the same time, the Board's decision in this case gives some indication of how, if *St. Cyr* were argued in this matter, the Board will ultimately decide in this case.

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

File: A90 453 081 – Harlingen Date: Jul 17 2002

In re: ALFONSO *ACOSTA*-GRIMALDO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se[1]

ON BEHALF OF SERVICE: Lisa M. Putnam,
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] – Convicted of controlled substance violation

APPLICATION: Termination of proceedings

ORDER:

PER CURIAM. The Immigration and Naturalization Service has timely appealed the January 29, 1998, decision of an Immigration Judge terminating removal proceedings against the respondent. The Service's request for oral argument is denied. 8 C.F.R. § 3.1(e) (1998). The

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[1] We acknowledge that Mr. Jonathan T. Jones, an accredited representative with Casa de Proyecto Libertad, has filed an appellate brief on the respondent's behalf. We cannot officially recognize Mr. Jones as the respondent's representative, however, as no Entry of Appearance, Form EOIR-27, has been filed in this case. However, we will serve a courtesy copy of this decision on Mr. Jones. In addition, we will serve this decision on the respondent at his last known address.

appeal will be sustained and the record will be remanded to the Immigration Judge.

We find that the legal issue in this case, to wit, whether the respondent has been "convicted" for immigration purposes, is controlled by precedent cases we issued after the Immigration Judge rendered her decision in this case. For the reasons set forth in *Matter of Salazar*, 23 I&N Dec. 223 (BIA 2002), and *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), we find that the respondent has been convicted of a controlled substance violation and thus is removable as charged by the Service under section 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. 1227(a)(2)(B)(i).

On appeal, the Service, in contradictory sentences, has asked both that the respondent be ordered removed to Mexico and that the record be remanded to the Immigration Judge for further proceedings. Service's Appeal Brief at 5-6. The respondent has requested that the record be remanded to the Immigration Judge so that he may apply for cancellation of removal under section 240A(a) of the Act, 8 U.S.C. 1229b, in the event that we sustained the Service's appeal. In light of the fact that both parties have suggested that a remand of the record is appropriate and the respondent has not been charged with removal under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an aggravated felony,[2] we will remand the record to the Immigration Judge to afford the respondent an opportunity to apply for any relief from removal for which he may be eligible.

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[2] *See* section 240A(a)(3) of the Act.

In light of the foregoing discussion, the Service's appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings.

/s/ Lori Scialabba
FOR THE BOARD

PERTINENT STATUTES

TITLE 8. ALIENS AND NATIONALITY
CHAPTER 12. IMMIGRATION AND NATIONALITY
GENERAL PROVISIONS

§ 1101. Definitions

(a) . . .

(43) The term "aggravated felony" means –

. . .

(B) illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act [21 USC § 802]), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code);

. . .

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 44. FIREARMS

§ 924. Penalties

. . .

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection –

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall –

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law –

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

General Docket
US Court of Appeals for the Fifth Circuit

Court of Appeals Docket #: 05-60908 Filed: 10/6/05
Nsuit: 0
Galindo-Pena v. Gonzales
Appeal from: Board of Immigration Appeals

Lower court information:

District: 0539-1 : A17 765 966
Date Filed: **/**/**
Date order/judgment: 9/29/05
Date NOA filed: **/**/**

05-60908 Galindo-Pena v. Gonzales

RAUL GALINDO-PENA

Petitioner

v.

ALBERTO R GONZALES, U S ATTORNEY GENERAL

Respondent

10/6/05	Agency case docketed. Petition for review filed by Petitioner Raul Galindo-Pena. [05-60908] ROA due on 11/15/05. (cmb) [05-60908]
10/6/05	Motion filed by Petitioner Raul Galindo-Pena for stay of deportation [5280780-1] Response/ Opposition due on 10/21/05. Date of COS: 10/5/05 Sufficient [Y/N]: y [05-60908] (cmb) [05-60908]
10/11/05	Notice filed by Respondent Alberto R Gonzales advising that petitioner was deported on 10/6/05. [05-60908] (cmb) [05-60908]

10/12/05 Appearance form filed by Lisa S Brodyaga for Petitioner Raul Galindo-Pena. [05-60908] (No. of forms filed: 1) (ajr) [05-60908]

10/21/05 Response/opposition filed by Respondent Alberto R Gonzales to motion for stay of deportation [5280780-1] by Petitioner Raul Galindo-Pena Response/Opposition ddl satisfied. Date of COS: 10/20/05 Sufficient [Y/N]: y [5292196-1] [05-60908] (mbc) [05-60908]

10/21/05 Appearance form filed by Norah Ascoli Schwarz for Respondent Alberto R Gonzales, John S Hogan for Respondent Alberto R Gonzales. [05-60908] (No. of forms filed: 2) (ajr) [05-60908]

11/7/05 Motion filed by Respondent Alberto R Gonzales to dismiss petition for review for lack of jurisdiction [5312880-1], alternatively to extend time to file administrative record until 30 days after the court's disposition of the motion to dismiss [5312880-2]. Response/Opposition due on 11/21/05. Date of COS: 11/04/05 Sufficient [Y/N]: Y [05-60908] (mrb) [05-60908]

11/9/05 Briefing notice issued. [05-60908] A/Pet's Brief due on 12/15/05 for Raul Galindo-Pena. (mbc) [05-60908]

11/14/05 Response/opposition filed by Petitioner Raul Galindo-Pena to motion to dismiss petition for review for lack of jurisdiction [5312880-1]; alternatively to extend time to file administrative record [5312880-2] by Respondent Alberto R Gonzales. Response/Opposition ddl satisfied. Reply to Resp/Opp due on 11/28/05. Date of COS: 11/09/05 Sufficient [Y/N]: Y [5312911-1] [05-60908] (mrb) [05-60908]

11/15/05 CLERK Order filed consolidating case 05-60594, 05-60595, 05-60596, 05-60626, 05-60627, 05-60692, 05-60798, 05-60834, 05-60850, 05-60854, 05-60857, 05-60867, 05-60908 with 05-60593 for purposes of briefing [5308231-1], to extend time to file appellant(s) brief until 12/15/05 [5308231-2] A/Pet's Brief ddl updated to 12/15/05 for Jose Ruben Sanchez-Pina in 05-60594, for Sergio Gallardo-Trevino in 05-60595, for Alfonso Ortega-Aguirre in 05-60596, for Jose Ezequiel Martinez-Martinez in 05-60626, for Angelina Aguilar-Adame in 05-60627, for Filogonio Garcia-Maldonado in 05-60692, for Rolando Cavazos in 05-60798, for Juana Garcia-Rios in 05-60834, for Guadalupe Garcia-Muniz in 05-60850, for Efrain Garcia Montalvo in 05-60854, for Jose Luis Garza-Saenz in 05-60857, for Irma Rodriguez-Gonzalez in 05-60867, for Raul Galindo-Pena in 05-60908. Copies to all counsel. [05-60594, 05-60595, 05-60596, 05-60626, 05-60627, 05-60692, 05-60798, 05-60834, 05-60850, 05-60854, 05-60857, 05-60867, 05-60908] (kkf) [05-60594 05-60595 05-60596 05-60626 05-60627 05-60692 05-60798 05-60834 05-60850 05-60854 05-60857 05-60867 05-60908]

11/23/05 COURT Order filed – petitioner's motion for stay of deportation pending review is DENIED AS MOOT. PETITIONER HAS BEEN DEPORTED. [5280780-1] (PEH, FPB, JLD) Copies to all counsel. [05-60908] (nfd) [05-60908]

12/12/05 Unopposed motion filed by Petitioner Filogonio Garcia-Maldonado in 05-60692 to sever appeal(s) 05-60692 from lead case number 05-60593 [5331654-1] Date of COS: 12/7/05 Sufficient [Y/N]: y [05-60692] (mbc) [05-60692]

12/15/05 CLERK Order filed granting petitioner's unopposed motion to sever appeal 05-60692 from appeal 05-60593. [5331654-1] (05-60593) Copies to all counsel. [05-60692] (cmb) [05-60692]

12/19/05 Unopposed motion filed by Petitioner Jose Ezequiel Martinez-Martinez in 05-60626 to sever appeal(s) 05-60593 from lead case number 05-60626 [5333066-1] Date of COS: 12/12/05 Sufficient [Y/N]: Y [05-60626] (cvt) [05-60626]

12/19/05 Appellant's Brief filed by Petitioner Ruben Dario Prado-Rivera in 05-60593, Petitioner Jose Ruben Sanchez-Pina in 05-60594, Petitioner Sergio Gallardo-Trevino in 05-60595, Petitioner Alfonso Ortega-Aguirre in 05-60596, Petitioner Angelina Aguilar-Adame in 05-60627, Petitioner Rolando Cavazos in 05-60798, Petitioner Juana Garcia-Rios in 05-60834, Petitioner Guadalupe Garcia-Muniz in 05-60850, Petitioner Efrain Garcia Montalvo in 05-60854, Petitioner Jose Luis Garza-Saenz in 05-60857, Petitioner Irma Gonzalez-Rodriguez in 05-60867, Petitioner Raul Galindo-Pena in 05-60908. Date of COS: 12/15/05 Disk Provided [Y/N]: y [5381748-1] [05-60593, 05-60594, 05-60595, 05-60596, 05-60627, 05-60798, 05-60834, 05-60850, 05-60854, 05-60857, 05-60867, 05-60908] A/Pet's Brief ddl satisfied. E/Res's Brief due on 1/18/06 for Alberto R Gonzales in 05-60593, for Alberto R Gonzales in 05-60594, for Alberto R Gonzales in 05-60595, for Alberto R Gonzales in 05-60596, for Alberto R Gonzales in 05-60627, for Alberto R Gonzales in 05-60798, for Alberto R Gonzales in 05-60834, for Alberto R Gonzales in 05-60850, for R Gonzales in 05-60854, for

Alberto R Gonzales in 05-60857, for Alberto R Gonzales in 05-60867, for Alberto R Gonzales in 05-60908. (rsm) [05-60593 05-60594 05-60595 05-60596 05-60627 05-60798 05-60834 05-60850 05-60854 05-60857 05-60867 05-60908]

12/20/05 CLERK Order filed granting petitioner's unopposed motion to sever appeal 05-60593 from 05-60626. [5333066-1] (05-60593) Copies to all counsel. [05-60626] (nfd) [05-60626]

12/21/05 Appearance form filed by Jodilyn Marie Goodwin for Petitioner Juana Garcia-Rios in 05-60834. [05-60834] (No. of forms filed: 1) (mbc) [05-60834]

1/12/06 COURT Order filed granting respondent's motion to dismiss petition for lack of jurisdiction. [5312880-1] (05-60593) Judge Initials: PEH FPB JLD denying as moot respondent's alternative motion to extend time to file Record on Appeal [5312880-2] Copies to all counsel. [05-60908] (cvt) [05-60908]

3/2/06 Motion filed by Petitioner Raul Galindo-Pena [5392674-1] for reconsideration of motion to dismiss appeal for lack of jurisdiction. [5312880-1] by Respondent Alberto R Gonzales Response/Opposition due on 3/13/06. Date of COS: 2/24/06 Sufficient [Y/N]: Y [05-60908] (cvt) [05-60908]

General Docket
US Court of Appeals for the Fifth Circuit

Court of Appeals Docket #: 06-60011 Filed: 1/6/06
Nsuit: 0
Acosta-Grimaldo v. Gonzales
Appeal from: Board of Immigration Appeals

- -

Lower court information:

District: 0539-1 : A90 453 081
Date Filed: **/**/**
Date order/judgment: 12/15/05
Date NOA filed: **/**/**

- -

06-60011 Acosta-Grimaldo v. Gonzales

ALFONSO ACOSTA-GRIMALDO

Petitioner

v.

ALBERTO R GONZALES, U S ATTORNEY GENERAL

Respondent

1/6/06	Agency case docketed. Petition for review filed by Petitioner Alfonso Acosta-Grimaldo. [06-60011] ROA due on 2/15/06. (cmb)
1/23/06	Appearance form filed by Lisa S Brodyaga for Petitioner Alfonso Acosta-Grimaldo. [06-60011] (No. of forms filed: 1) (mkc)
1/24/06	Appearance form filed by John Clifford Cunningham for Respondent Alberto R Gonzales, Luis Enrique Perez for Respondent Alberto R Gonzales. [06-60011] (No. of forms filed: 2) (nfd)

2/15/06 Motion filed by Respondent Alberto R Gonzales to dismiss for lack of jurisdiction in part [5375625-1], for summary affirmance in part. [5375625-2], to extend time to file certified administrative record 30 days from disposition of motion [5375625-3] Response/Opposition due on 3/3/06. Date of COS: 2/14/06 Sufficient [Y/N]: y [06-60011] (mbc)

2/15/06 Appearance form filed by Linda Susan Wendtland for Respondent Alberto R Gonzales. [06-60011] (No. of forms filed: 1) (mkc)

2/17/06 Opposition filed by Petitioner Alfonso Acosta-Grimaldo to motion to dismiss appeal for lack of jurisdiction. [5375625-1] by Respondent Alberto R Gonzales, motion for summary affirmance [5375625-2] by Respondent Alberto R Gonzales, motion extend time to file Record on Appeal [5375625-3] by Respondent Alberto R Gonzales Response/Opposition ddl satisfied. Reply to Resp/Opp due on 2/27/06. Date of COS: 2/16/06 Sufficient [Y/N]: Y [5376208-1] [06-600111 (cvt)

3/16/06 Unopposed motion filed by Petitioner Alfonso Acosta-Grimaldo for stay of deportation [5396426-1] Date of COS: 3/15/06 Sufficient [Y/N]: y [06-60011] (cmb)

3/16/06 COURT Order filed: IT IS ORDERED that respondent's motion to dismiss petition for review for lack of jurisdiction is GRANTED. IT IS FURTHER ORDERED that respondent's motion for summary affirmance in part is GRANTED. IT IS FURTHER ORDERED that respondent's alternative motion for an extension of 30 days after disposition of motions to dismiss and remand in which to file the administartive [sic] record is DENIED AS

MOOT. [5375625-1] Judge Initials: RHB CES EBC [5375625-2] Mandate ddl updated to 5/8/06 [5375625-3] Copies to all counsel. (06-60011] (cmb)

FILED
JUL 7 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1276

In the Supreme Court of the United States

RAUL GALINDO-PENA AND ALFONSO ACOSTA-GRIMALDO, PETITIONERS

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

The Immigration and Nationality Act attaches a variety of immigration consequences to an alien's commission of an "aggravated felony," 8 U.S.C. 1101(a)(43) (2000 & Supp. III 2003). The Act includes within its definition of "aggravated felony" "any felony punishable under the Controlled Substances Act." 18 U.S.C. 924(c)(2) (as incorporated into 8 U.S.C. 1101(a)(43)(B)). That term applies to offense conduct "whether in violation of Federal or State law." 8 U.S.C. 1101(a) (43) (2000 & Supp. III 2003) (final paragraph). The questions presented are:

1. Whether the court of appeals had jurisdiction over the legal questions raised in the petitions for review notwithstanding the petitioners' convictions for aggravated felonies.

2. Whether a conviction for a controlled substance offense that is a felony under state law and would be independently punishable under the Controlled Substances Act constitutes an "aggravated felony."

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In the Supreme Court of the United States

No. 05-1276

RAUL GALINDO-PENA AND ALFONSO ACOSTA-GRIMALDO, PETITIONERS

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The orders of the court of appeals dismissing the petitions for review of both petitioners (Pet. App. 1, 17-18) are unreported. The decisions of the Board of Immigration Appeals (Pet. App. 2-4, 20-21, 30-32) and the immigration judges (Pet. App. 5-11, 22-29) in each of petitioner's cases are unreported.

JURISDICTION

The court of appeals entered orders dismissing petitioners Galindo-Pena's and Acosta-Grimaldo's cases on January 12, 2006, and March 16, 2006, respectively. The petition for a writ of certiorari was filed on March 31, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who commits an "aggravated felony," 8 U.S.C. 1101(a)(43) (2000 & Supp. III 2003), may be ordered removed from the United States, 8 U.S.C. 1227(a)(2)(A)(iii). The commission of an aggravated felony also limits the potential forms of relief from removal that are available to the alien, including, as relevant here, rendering the alien ineligible to apply for cancellation of removal, see 8 U.S.C. 1229b(a)(3) and (b)(1)(C).[1]

The INA defines an "aggravated felony" by reference to a lengthy list of criminal offenses, one of which is "illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. 1101(a)(43)(B). The term "aggravated felony" applies to such offenses "whether in violation of Federal or State law." 8 U.S.C. 1101(a)(43) (2000 & Supp. III 2003) (final paragraph).[2]

Section 924(c) of Title 18, in turn, defines "drug trafficking crime" as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement

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[1] The Attorney General may, in his discretion, cancel the removal of an alien who (i) has been a lawfully admitted permanent resident for not less than five years, (ii) has resided in the United States after having been admitted in any status for a continuous period of seven years prior to commencement of the removal proceedings, and (iii) has not been convicted of any aggravated felony. 8 U.S.C. 1229b(a)(1)-(3).

[2] Under the INA, a single offense of possessing 30 grams (approximately one ounce) or less of marijuana does not provide a basis for removal. 8 U.S.C. 1227(a)(2)(B)(i).

Act (46 U.S.C. App. 1901 et seq.)." 18 U.S.C. 924(c)(2). Title 18 defines a "felony" as an offense for which "the maximum term of imprisonment authorized" exceeds one year. 18 U.S.C. 3559(a). The Controlled Substances Act, 21 U.S.C. 801 *et seq.*, defines "felony" generally as "any Federal or State offense classified by applicable Federal or State law as a felony." 21 U.S.C. 802(13). The Controlled Substances Act further defines a "felony drug offense" as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." Anabolic Steroid Control Act of 2004, Pub. L. No. 108-358, § 2(a)(2), 118 Stat. 1663 (to be codified at 21 U.S.C. 802(44)); see generally 21 U.S.C. 802(44).

2. a. Petitioner Galindo-Pena is a native and citizen of Mexico, who entered the United States as an immigrant in 1968. Pet. App. 5. In May 2002, Galindo-Pena pleaded guilty in Texas state court to possession of a controlled substance (cocaine). *Id.* at 2-3, 6; see Tex. Health & Safety Code Ann. § 481.115(a) (West 2003). He was sentenced to two years in state prison, Pet. App. 6, but the sentence was then suspended and he was placed on probation for five years, *id.* at 5-6.

The Immigration and Naturalization Service commenced removal proceedings against Galindo-Pena, charging him with being removable as an alien convicted of both a controlled substance offense, 8 U.S.C. 1227(a)(2)(B)(i), and an "aggravated felony," 8 U.S.C. 1227(a)(2)(A)(iii). Pet. App. 5-6.[3] An immigration judge

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[3] The Immigration and Naturalization Service's immigration-enforcement functions have since been transferred to United States

sustained both charges, holding that Galindo-Pena's felony drug possession offense was a "drug trafficking crime" and an "aggravated felony" within the meaning of 8 U.S.C. 1101(a)(43)(B). Pet. App. 5-11.

The Board of Immigration Appeals (Board) affirmed. Pet. App. 2-4. The Board held that Galindo-Pena's cocaine offense was an aggravated felony within the meaning of 8 U.S.C. 1101(a)(43)(B). See Pet. App. 3 (citing *United States* v. *Caicedo-Cuero*, 312 F.3d 697 (5th Cir. 2002), cert. denied, 538 U.S. 1021 (2003)). The Board also held that Galindo-Pena's conviction of an aggravated felony rendered him statutorily ineligible for the discretionary relief of cancellation of removal. *Id.* at 4.

b. Petitioner Acosta-Grimaldo is a native and citizen of Mexico, who entered the United States in 1989 as an immigrant. Pet. App. 23. In 1997, Acosta-Grimaldo pleaded guilty in Texas state court to the intentional and knowing possession of more than 50 but less than 2000 pounds of marijuana. *Id.* at 25-26; see Tex. Health & Safety Code Ann. § 481.121(a)(5) (West 2003). Under Texas law, that offense is a felony punishable by a minimum sentence of two years, but no more than twenty years, of imprisonment. Tex. Penal Code Ann. § 12.33(a) (West 2003); Tex. Health & Safety Code Ann. § 481.121(a)(5) (West 2003). Acosta-Grimaldo was sentenced to eight years of imprisonment. Gov't C.A. Mot. to Dismiss 2. The sentence was suspended, and he was placed on probation for eight years. See Pet. App. 26.

The Immigration and Naturalization Service subsequently commenced removal proceedings against Acosta-Grimaldo on the ground that he was convicted

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Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. III 2003).

of a controlled substance offense, see 8 U.S.C. 1227(a)(2)(B)(i). An immigration judge terminated the proceedings, Pet. App. 30, ruling that Acosta-Grimaldo's offense did not render him removable because he received a sentence that was rehabilitative in nature, Pet. 9. The Board reversed based on intervening precedent establishing that Acosta-Grimaldo's conviction constituted a controlled substance offense, Pet. App. 31, and remanded the case to the immigration judge to determine whether Acosta-Grimaldo was eligible for discretionary relief from removal, *ibid.*

The immigration judge denied Acosta-Grimaldo's application for cancellation of removal, holding that Acosta-Grimaldo's conviction for possession of a controlled substance was an aggravated felony under Fifth Circuit and Board precedent. Pet. App. 26 (citing *In re Salazar-Regino*, 23 I. & N. Dec. 223 (BIA 2002); *United States* v. *Hernandez-Avalos*, 251 F.3d 505 (5th Cir.), cert. denied, 534 U.S. 935 (2001); *United States* v. *Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997)).

The Board affirmed the immigration judge's holding that Acosta-Grimaldo was ineligible for relief from removal because he had been convicted of an aggravated felony. Pet. App. 20-21.[4]

3. Both petitioners appealed. The government moved to dismiss the petitions for lack of jurisdiction under 8 U.S.C. 1252(a)(2)(C), on the ground that both

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[4] The Board also found that Acosta-Grimaldo had pleaded guilty to the controlled substance offense in May 1997, which was after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. See Pet. App. 20-21. The Board held, as a result, that Acosta-Grimaldo did not qualify for relief under *INS* v. *St. Cyr*, 533 U.S. 289 (2001). See Pet. App. 21. Petitioner does not seek this Court's review of that question.

petitioners' state-law convictions were aggravated felonies within the meaning of 8 U.S.C. 1101(a)(43)(B), based on Fifth Circuit precedent.[5] The court of appeals summarily dismissed both cases for lack of jurisdiction. Pet. App. 1, 17-18.

DISCUSSION

1. This Court's review of the question "whether the Fifth Circuit had jurisdiction to review the issues of law and constitutional questions presented" by petitioners (Pet. 13) is not warranted. That jurisdictional question has been definitively resolved by Section 106(a)(1)(A)(iii) of the Real ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 310 (to be codified at 8 U.S.C. 1252(a)(2)(D)). That provision states that the limitation on judicial review in cases involving criminal aliens, 8 U.S.C. 1252(a)(2)(C), does not apply to "constitutional claims and questions of law." REAL ID Act § 106(a)(1)(A)(iii), 119 Stat. 310. Such legal questions and constitutional claims are now reviewed exclusively in the courts of appeals, and may not be reviewed in habeas corpus proceedings. *Ibid.* Thus, neither petitioner nor the government disputes that the court of appeals had jurisdiction to review petitioners' legal arguments that their drug possession offenses are not "aggravated felonies."

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[5] Section 1252(a)(2)(C), as amended by Section 106(a)(1)(A) of the Real ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 310, provides, in relevant part, that, "[n]otwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, * * * no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense" designated in, *inter alia*, 8 U.S.C. 1227(a)(2)(B), which governs controlled substance offenses.

2. Petitioners also seek review (Pet. i) of the court of appeals' determination that their state convictions for drug possession were "aggravated felon[ies]," under 8 U.S.C. 1101(a)(43)(B), which preclude them from obtaining the discretionary relief of cancellation of removal.

On April 3, 2006, this Court granted writs of certiorari in *Lopez* v. *Gonzales*, 126 S. Ct. 1651 (No. 05-547), and *Toledo-Flores* v. *United States*, 126 S. Ct. 1652 (No. 05-7664), to decide whether the commission of a controlled substance offense that is a felony under state law, but that is generally punishable under the Controlled Substances Act only as a misdemeanor, constitutes an "aggravated felony" within the meaning of 8 U.S.C. 1101(a)(43)(B). The *Lopez* case arises in the context of a removal proceeding under federal immigration law, and *Toledo-Flores* arises in the criminal sentencing context. Because the Court's decision in those consolidated cases will determine the proper interpretation of the same statutory provision (8 U.S.C. 1101(a)(43)(B)) at issue here, the Court should hold this petition pending the Court's decision in *Lopez* and *Toledo-Flores*.

We note, however, that there is substantial doubt that the criminal conduct in which petitioners engaged would have been punished as misdemeanors under federal law. Petitioner Acosta-Grimaldo pleaded guilty to having possessed 50 to 2000 pounds of marijuana. Because of the large amount of marijuana that Acosta-Grimaldo was convicted of possessing, it is highly likely that the offense conduct to which he pleaded guilty would have been charged as possession with intent to distribute—which is a felony under federal law, see 21

U.S.C. 841(a) and 21 U.S.C. 841(b)(1) (2000 & Supp. III 2003)—rather than misdemeanor simple possession.[6]

With respect to petitioner Galindo-Pena, the administrative record reveals that, prior to his 2002 felony conviction for possession of cocaine, Galindo-Pena was convicted in 1986 in Texas state court of marijuana possession.[7] Under the federal Controlled Substances Act, a drug possession offense is punishable by up to two years in prison if a person "commits such offense after * * * a prior conviction for any drug, narcotic, or chemical, offense chargeable under the law of any State, has become final." 21 U.S.C. 844(a). Thus, Galindo-Pena's 2002 possession offense would have been punishable as a felony under federal law. See 18 U.S.C. 3559(a) (classifying an offense with a two-year sentence as a felony).

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[6] See, *e.g.*, *United States* v. *Haskins*, 166 Fed. Appx. 76 (4th Cir. 2006) (per curiam) (charging possession with intent to distribute 310.6 grams—approximately 11 ounces—of marijuana); *United States* v. *Rangel*, 149 Fed. Appx. 254, 255 (5th Cir. 2005) (per curiam) (charging possession with intent to distribute 771 grams—approximately 1.75 pounds—of marijuana).

[7] Because petitioner's appeal was dismissed, no certified administrative record was filed with the court.

CONCLUSION

With respect to the first question presented, the petition for a writ of certiorari should be denied. With respect to the second question presented, the petition for a writ of certiorari should be held pending this Court's decision in *Lopez* v. *Gonzales*, No. 05-547, and *Toledo-Flores* v. *United States*, No. 05-7664, and then dispose of in accordance with the Court's decision in those consolidated cases.

Respectfully submitted.

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